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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-07-1176-MkKuPa
)		
7	PW, LLC,)	Bk. No.	LA 06-16059 BB
)		
8	Debtor.)		
)		
9	_____)		
10	CLEAR CHANNEL OUTDOOR, INC.,)		
)		
11	Appellant,)		
)		
12	v.)	CORRECTED OPINION	
)		
13	NANCY KNUPFER, Chapter 11)		
	Trustee; DB BURBANK, LLC,)		
14	Appellees.)		
)		
15	_____)		

Argued and Submitted on November 29, 2007
at Pasadena, California

Filed - May 30, 2008
As Corrected - July 18, 2008*

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Sheri Bluebond, Bankruptcy Judge, Presiding.

Before: MARKELL, KURTZ** and PAPPAS, Bankruptcy Judges.

* Minor clerical revisions have been made to this Opinion,
originally issued on May 30, 2008, as reflected in the Clerk's
Notice of Minor Clerical Changes filed contemporaneously
herewith.

** Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern
District of Washington, sitting by designation.

1 MARKELL, Bankruptcy Judge:

2 This appeal presents a simple issue: outside a plan of
3 reorganization, does § 363(f) of the Bankruptcy Code permit a
4 secured creditor to credit bid its debt and purchase estate
5 property, taking title free and clear of valid, nonconsenting
6 junior liens? We hold that it does not.

7 In reaching this conclusion, we reject the contention that
8 once the sale is consummated, the appeal from the order stripping
9 the junior creditor's liens is moot and immune from scrutiny, and
10 we hold that, in the circumstances of this case, the junior
11 lienholder's rights are preserved.

12 The debtor in this case, PW, LLC ("PW"), owned prime real
13 estate in Burbank, California. DB Burbank, LLC ("DB"), an
14 affiliate of a large public hedge fund, held a claim of more than
15 \$40 million secured by PW's property. But problems large and
16 small plagued PW's development plan. These problems ultimately
17 led to PW's chapter 11 bankruptcy and to the appointment of Nancy
18 Knupfer as PW's chapter 11 trustee ("Trustee").

19 DB, working with the Trustee, organized a campaign to
20 consolidate all of PW's property and development rights and to
21 sell this package, free and clear of all claims and encumbrances,
22 at a sale supervised by the bankruptcy court.¹ At the sale, DB

23
24 ¹ The working partnership extended to the briefs in this
25 matter, as the appellees divided the issues between them. Even
26 with this understanding, however, the briefs violated the length
27 rules found in 9TH CIR. BAP RULES 8010(a)-1 & 8010(c)-1. The panel
28 discussed its concerns with counsel for the parties at oral
argument, and we feel compelled to again highlight those rule
violations here. For example, Clear Channel attached extraneous

(continued...)

1 was the highest bidder, paying its consideration by credit-
2 bidding the entire amount of its debt.

3 The only problem was the existence of a consensual lien
4 securing a claim of approximately \$2.5 million in favor of a
5 junior creditor, Clear Channel Outdoor, Inc. ("Clear Channel").
6 Relying solely on § 363(f)(5), the bankruptcy court confirmed the
7 sale to DB free and clear of Clear Channel's lien. The
8 bankruptcy court then denied a stay of the sale pending appeal,
9 as did our motions panel.

10 The first issue presented is whether the appeal is moot. We
11 conclude that while any relief related to the transfer of title
12 to DB is moot, stripping Clear Channel's lien and related state
13 law rights present an issue that is discrete and separable from
14 title transfer. That part of Clear Channel's appeal is not moot.

15 After reviewing applicable law, we conclude that § 363(f)(5)
16 cannot support transfer of PW's property free and clear of Clear
17 Channel's lien based on the existing record. We thus reverse
18 that portion of the bankruptcy court's order authorizing the sale
19 to DB free and clear of Clear Channel's lien, and we remand the
20 matter to the bankruptcy court for further proceedings.

21 _____
22 ¹(...continued)
23 materials to its brief apparently in an effort to include more
24 substance than the 30-page limitation would allow. DB's and the
25 Trustee's coordinated briefs contain even more transparent
26 efforts to evade the page limit. DB's brief, for example, used
27 significantly reduced margins, improperly small font sizes, and
28 inappropriate line spacing, and contained excessive,
single-spaced footnotes. Under the circumstances, it is
difficult for the panel to conclude that these tactics were
unintentional. In our view, this approach to advocacy is
inappropriate and unfair. Counsel should avoid future attempts
to evade court rules.

1 Finally, Clear Channel contends that a separate payment
2 obligation from DB to the Trustee was subject to Clear Channel's
3 lien, and that the bankruptcy court improperly stripped its lien
4 rights in that payment obligation. We hold that the payment
5 obligation was not subject to Clear Channel's lien, and we affirm
6 on this point.

7 I. FACTS

8 Before filing for bankruptcy, PW owned and was attempting to
9 develop real property in Burbank, California. It had a
10 development agreement with the City of Burbank ("Development
11 Agreement") that provided entitlements for a mixed-use complex of
12 luxury condominiums and retail space. In order to realize the
13 value of the entitlements, however, PW had to acquire an
14 assemblage of eighteen parcels of real estate by February 2009.
15 When it filed bankruptcy, PW owned only fourteen of the necessary
16 parcels. It had, however, entered into an agreement to acquire
17 the final four parcels, which were occupied by a church ("Church
18 Property"). Closing this agreement and the final purchase of the
19 Church Property was conditioned on the church's finding another
20 suitable location for its activities.

21 DB held a first-priority lien on substantially all of PW's
22 assets. It began foreclosure proceedings in July 2006 and sought
23 the appointment of a state court receiver. After the receiver
24 was appointed, DB lent the receiver more money to buy additional
25 parcels.

26 During this time, DB and PW tried to negotiate a chapter 11
27 plan. They had not reached an agreement when, on November 20,
28 2006, on the eve of a scheduled foreclosure sale, PW filed a

1 chapter 11 case. DB immediately moved for, and the bankruptcy
2 court granted, the appointment of a trustee, which was done on
3 December 27. The receiver turned over all of PW's assets to the
4 Trustee in January 2007.

5 The Trustee faced several immediate problems. These
6 included obtaining and paying the cure amounts related to the
7 contract to acquire the Church Property, and otherwise
8 implementing the terms of the Development Agreement. In
9 addition, as a "single asset real estate" case, see 11 U.S.C.
10 § 101(51B), it was likely that DB would be granted relief from
11 stay under § 362(d)(3).²

12 In response, the Trustee proposed to sell PW's property and
13 began discussions with DB to that end. With bankruptcy court
14 authorization, the Trustee hired a real estate broker to market
15 PW's property to others. In addition, to facilitate acquisition
16 of the Church Property, the broker agreed to help the Trustee

17
18 ² Section 362(d)(3) provides in relevant part:

19 (d) On request of a party in interest and after
20 notice and a hearing, the court shall grant relief from
21 the stay provided under subsection (a) of this section,
such as by terminating, annulling, modifying, or
conditioning such stay—...

22 (3) with respect to a stay of an act against
23 single asset real estate under subsection (a), by a
24 creditor whose claim is secured by an interest in such
25 real estate, unless, not later than the date that is 90
days after the entry of the order for relief . . . or
30 days after the court determines that the debtor is
subject to this paragraph, whichever is later—

26 (A) the debtor has filed a plan of
27 reorganization that has a reasonable possibility
of being confirmed within a reasonable time; or

28 (B) the debtor has commenced monthly payments

. . . .

1 find a new location for the church.³

2 After negotiation, the Trustee and DB entered into an
3 agreement they called a "Binding Term Sheet," which established
4 detailed sale procedures for an auction and sale of PW's assets.
5 Under its terms, the Trustee gained time to market and sell PW's
6 property and to resolve disputes that had arisen regarding the
7 Church Property.

8 The Binding Term Sheet also provided that DB would serve as
9 a stalking horse bidder for a sale of PW's property. If there
10 were no qualified overbidders, DB would buy PW's property for
11 \$41,434,465, which the parties called the "Strike Price."⁴ In
12 addition, DB agreed to pay the Trustee a "Carve-Out Amount" of up
13 to \$800,000 for certain administrative fees and other expenses.⁵
14 DB also agreed not to seek relief from the automatic stay and to
15 refrain from communicating with third parties regarding the sale
16 of PW's assets.

17 On March 20, 2007, the bankruptcy court entered an order
18 establishing a procedure for the sale of PW's property. Two days
19 later, the Trustee moved to approve the sale free and clear of
20 liens under § 363(f)(3) and (f)(5).

21 Clear Channel opposed the motion, asserting that § 363(f)
22 was not applicable. Over Clear Channel's objection, on April 26,
23

24 ³ The broker was not entitled to a commission if DB, PW, or
25 an affiliate of either acquired PW's property.

26 ⁴ The Strike Price equaled the amount due to DB plus a
27 senior lien, less the negotiated minimum overbid amount.

28 ⁵ The Carve-Out Amount was to be reduced to \$550,000 if DB
paid the receiver's final fees.

1 2007, the bankruptcy court entered a separate order authorizing
2 the sale free and clear of Clear Channel's lien under § 363(f)(5)
3 ("Sale Order").

4 The March 20 order set May 7 as the deadline for submitting
5 written bids, and the same order set the minimum overbid at
6 \$43,618,048, plus whatever amount was necessary to cure defaults
7 related to acquiring the Church Property. Only three bids were
8 timely received, and none qualified. The highest was a
9 nonconforming contingent bid of only \$25.25 million.

10 With no qualified overbidders, the Binding Term Sheet
11 required the Trustee to sell PW's property to DB at the Strike
12 Price, DB to pay the Trustee the Carve-Out Amount, and DB to pay
13 certain administrative fees, including the receiver's fees and
14 other expenses.

15 On May 31, 2007, the bankruptcy court confirmed the sale to
16 DB and found that DB was a purchaser in good faith. The court
17 entered an order to this effect ("Confirmation Order"), and
18 declined to stay that order pending appeal, as did a prior
19 motions panel of this court.

20 The sale closed on June 15, 2007. Clear Channel received no
21 payment under the terms of the sale because DB's credit bid meant
22 that there were no proceeds to which Clear Channel's lien could
23 attach. Since closing, DB has paid out more than \$1.5 million,
24 including \$250,000 in final payment to the receiver for fees and
25 expenses, \$550,000 to the estate as the remaining Carve-Out
26 Amount, \$750,000 to a senior lienholder, and other amounts
27 necessary to pay outstanding real estate taxes and other costs of
28 closing. For her part, the Trustee has made payments out of the

1 Carve-Out Amount to herself and her professionals on an interim
2 basis.

3 Clear Channel filed a timely appeal on May 1, 2007, and
4 seeks reversal of both the Sale Order and the Confirmation Order.
5 Clear Channel also asserts that its lien extends to the Carve-Out
6 Amount and seeks reversal of the bankruptcy court's order that it
7 does not.⁶

8 II. STANDARDS OF REVIEW

9 "We review the bankruptcy court's conclusions of law and
10 questions of statutory interpretation de novo, and factual
11 findings for clear error." Village Nurseries v. Gould (In re
12 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999)
13 (citations omitted). See also Ritter Ranch Dev., L.L.C., v. City
14 of Palmdale (In re Ritter Ranch Dev., L.L.C.), 255 B.R. 760, 763
15 (9th Cir. BAP 2000).

16 In addition, we review orders to sell property under 11
17 U.S.C. § 363(b) and (f) for an abuse of discretion. Darby v.
18 Zimmerman (In re Popp), 323 B.R. 260, 265 (9th Cir. BAP 2005).
19 We find an abuse of discretion if we have a definite and firm
20 conviction that the bankruptcy court committed a clear error of
21 judgment, Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th
22 Cir. BAP 2007), or if the court incorrectly interpreted the law.
23 In re Popp, 323 B.R. at 265; United States v. Sprague, 135 F.3d

24
25 ⁶ After the sale closed, DB and the Trustee moved to dismiss
26 this appeal as moot. On September 11, 2007, a motions panel
27 granted DB's motion as to the sale, citing § 363(m). But that
28 motions panel left it to this merits panel to determine whether
stripping Clear Channel's lien under § 363(f) was moot and
whether Clear Channel was entitled to any portion of the
Carve-Out Amount.

1 1301, 1304 (9th Cir. 1998).

2 **III. DISCUSSION**

3 Before reaching the merits of Clear Channel's appeal, we
4 must first determine whether it is moot. That determination
5 requires us to examine what it means for an appeal from a sale
6 order to be moot.

7 A. *Mootness*

8 In bankruptcy, mootness comes in a variety of flavors:
9 constitutional, equitable, and statutory.

10 1. **Constitutional Mootness**

11 Constitutional mootness derives from constitutional
12 limitations on the federal court to adjudicate only actual cases
13 and live controversies. DeFunis v. Odegaard, 416 U.S. 312, 316
14 (1974); In re Popp, 323 B.R. at 270-271 (citing Luckie v. EPA,
15 752 F.2d 454, 457 (9th Cir. 1985)). A live case or controversy
16 exists only if the parties have an interest in the outcome of the
17 litigation. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight
18 Handlers, Exp. & Station Employees, 466 U.S. 435, 442 (1984).
19 But that interest in the outcome of the case dissolves, and an
20 appeal is constitutionally moot, only if it is impossible to
21 grant relief. Church of Scientology of Cal. v. United States,
22 506 U.S. 9, 12 (1992).

23 Here, although the sale has been completed, there is still a
24 live case or controversy because it is still possible to fashion
25 some relief. The sale under both § 363(b) and § 363(f) may be
26 reversed in full, or the sale itself under § 363(b) could be
27 preserved while stripping liens under § 363(f) could be reversed.
28 Such relief might be difficult or inequitable, but it is not

1 impossible. Therefore, the appeal is not constitutionally moot.

2 **2. Equitable Mootness**

3 Equitable mootness requires the court to look beyond
4 impossibility of a remedy to "the consequences of the remedy and
5 the number of third parties who have changed their position in
6 reliance on the order that is being appealed."⁷ In re Popp, 323
7 B.R. at 271. As we further stated in Popp, "[c]ourts have
8 applied the doctrine of equitable mootness when the appellant has
9 failed to obtain a stay and [although relief is possible] the
10 ensuing transactions are too 'complex and difficult to unwind.'" Id.
11 at 271 (citations omitted). "Ultimately, the decision
12 whether to unscramble the eggs turns on what is practical and
13 equitable." Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re
14 Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994).

15 The changes that have taken place in connection with and
16 since the closing of the sale are numerous and complex, which
17 calls into question whether this appeal is equitably moot. Title
18 to PW's property has been transferred to DB, and the Trustee has
19 relinquished control over the development of PW's property to DB.
20 DB has assumed the executory contracts and unexpired leases. DB
21

22 ⁷ Another form of equitable mootness, not present on the
23 record here because of Clear Channels efforts to obtain a stay,
24 exists when "'appellants have failed and neglected diligently to
25 pursue their available remedies to obtain a stay of the
26 objectionable orders of the Bankruptcy Court,' thus 'permitting
27 such a comprehensive change of circumstances to occur as to
28 render it inequitable to consider the merits of the appeal.'" Focus Media, Inc., v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2004) (quoting Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 798 (9th Cir. 1981)).

1 has also executed and recorded a number of documents necessary to
2 effectuate the sale. All of these have required significant
3 expenditures.

4 As the Ninth Circuit recently noted:

5 "Bankruptcy's mootness rule 'developed from the general
6 rule that the occurrence of events which prevent an
7 appellate court from granting effective relief renders
8 an appeal moot, and the particular need for finality in
9 orders regarding stays in bankruptcy.'" . . . The
10 policy behind mootness is "to protect the interest of a
11 good faith purchaser . . . of the property."

12 Suter v. Goedert, 504 F.3d 982, 986 (9th Cir. 2007) (quoting
13 Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona
14 Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988)).

15 Although the sale of the property was to a party to this
16 appeal, there have been many subsequent actions that were relied
17 on by third parties that are not party to this appeal. Although
18 DB was aware of the risks of going forward with the sale, third
19 parties were not and have since acted in reliance on the
20 bankruptcy court's orders.

21 Under equitable mootness, when a trustee has already sold
22 assets, "a court may be powerless to 'undo what has already been
23 done.'" Focus Media, 378 F.3d at 922-23 (citation omitted).
24 Here, even though all parties to the sale are present before this
25 panel, complexities that cannot be easily undone arise with
26 respect to the sale. These complexities and the impact on third
27 parties make review of the sale (but only the sale) to DB
28 equitably moot.

29 But the same cannot be said about reinstating Clear
30 Channel's liens. An appeal is not equitably moot as to lien-
31 stripping under § 363(f) if reversing the lien-stripping raises

1 neither the issue of complexity nor the issue of negative impact
2 on third parties. That is the case here, and we hold that the
3 lien-stripping aspect of the Sale Order is not equitably moot.
4 See In re Popp, 323 B.R. at 271-72.

5 As an initial matter, reattaching Clear Channel's lien to
6 PW's former property is not theoretically or practically
7 difficult. Both parties are before the court, and no third-party
8 action is required to reestablish Clear Channel's position.
9 Moreover, DB has not identified any third party who would be
10 prejudiced because it relied on the bankruptcy court's orders.
11 See Suter, 504 F.3d at 986 (party asserting mootness has heavy
12 burden to establish a lack of effective relief); Focus Media, 378
13 F.3d at 923 (same). As a result, while the appeal related to the
14 sale itself may be equitably moot, the panel could reverse the
15 transfer of Clear Channel's lien to the nonexistent sale proceeds
16 and hold that it remains attached to property transferred to DB.
17 In re Popp, 323 B.R. at 272. See also Beneficial Cal. Inc. v.
18 Villar (In re Villar), 317 B.R. 88 (9th Cir. BAP 2004) (finding
19 avoidance of lien was ineffective as to property that may have
20 been sold even though third-party buyer was not a party to the
21 appeal).⁸

22 By similar reasoning, our motions panel segregated the sale
23

24 ⁸ Courts have also recognized that when the substantive
25 error on appeal is alleged to be one of the misapplication of a
26 statute to the derogation of a creditor's nonbankruptcy property
27 rights, or in derogation of an estate professional's fiduciary
28 duties, the practical effects of a reversal are of somewhat
lesser importance in the calculation of equitable mootness. See,
e.g., Focus Media, 378 F.3d at 923-24; Elder v. Uecker (In re
Elder), 325 B.R. 292, 296-98 (N.D. Cal. 2005).

1 portion of the Sale Order from the lien-stripping portion of the
2 order. Given the relative ease with which Clear Channel can
3 receive the relief it requests (if it is entitled to that
4 relief), and the relative lack of prejudice to anyone other than
5 the parties to this appeal, we hold that Clear Channel's appeal
6 of the stripping of its lien is not equitably moot.

7 **3. Statutory Mootness Under § 363(m)**

8 Sales of property of the estate under § 363(b) and (c) are
9 protected by § 363(m), which states:

10 The reversal or modification on appeal of an
11 authorization under subsection (b) or (c) of this
12 section of a sale or lease of property does not affect
13 the validity of a sale or lease under such
14 authorization to an entity that purchased or leased
15 such property in good faith, whether or not such entity
16 knew of the pendency of the appeal, unless such
17 authorization and such sale or lease were stayed
18 pending appeal.

19 11 U.S.C. § 363(m).

20 Section 363(m) is a codification of some aspects of
21 equitable mootness with respect to sales. Unlike equitable
22 mootness, however, § 363(m) provides for specific procedures and
23 findings in order to provide certainty for sales.

24 DB contends that this section deprives this court of the
25 ability to affect the sale. It argues that Clear Channel did not
26 obtain a stay pending appeal, and the bankruptcy court made
27 findings that DB acted in good faith. These facts reinforce our
28 decision not to tamper with transfer of title to DB. The appeal
for that part of the transaction is equitably moot, as we noted
above, and the facts establish that it is also protected by
§ 363(m).

But the Confirmation Order authorized both a sale of PW's

1 property and lien-stripping. While the lack of a stay and a
2 transfer of the property would be relevant to whether § 363(m)
3 applies to a sale authorized by § 363(b), these facts continue to
4 be relevant only if § 363(m) applies to lien-stripping
5 authorizations under § 363(f). We do not consider these facts,
6 however, because we conclude that § 363(m) does not apply to
7 lien-stripping under § 363(f).

8 First, § 363(m) by its terms applies only to “an
9 authorization under subsection (b) or (c) of this section . . .
10 .” Here, the remaining challenge is to the authorization under
11 subsection (f) to sell the property free of Clear Channel’s lien.
12 Section 363(m) thus cleaves a distinction between authorizations
13 to “use, sell or lease . . . property of the estate” as set forth
14 in § 363(b) and authorizations under § 363(f) to “sell property
15 under subsection (b) or (c) of this section free and clear of any
16 interest in such property” Section 363(m) thus protects
17 the court’s authorization of a sale, in this case, out of the
18 ordinary course of business, again making a distinction between
19 the authorization of a sale and the terms under which the sale is
20 to be made.

21 Second, the subsection limits only the ability to “affect
22 the validity of a sale or lease under such authorization”
23 Here, the telling locution is the limitation of § 363(m) to
24 “sale[s] or lease[s]” authorized under § 363(b) or (c). Omitted
25 is the “use” prong of authorization. As a result, a plain-
26 language reading of the section would not give § 363(m)
27 protection to an out-of-the-ordinary-course use approved by a
28 bankruptcy court. See Part III.B.1., infra.

1 This limitation leads us to conclude that Congress intended
2 that § 363(m) address only changes of title or other essential
3 attributes of a sale, together with the changes of authorized
4 possession that occur with leases. The terms of those sales,
5 including the "free and clear" term at issue here, are not
6 protected.

7 Indeed, Congress could easily have broadened the protection
8 of § 363(m) to include lien-stripping. As an example, it could
9 have stated that all "transfers" were to be protected, as that
10 term is broadly defined in § 101(54). It did not. Instead, it
11 restricted the protection of § 363(m) to sales and leases.⁹

12 That § 363(m) is so limited can also be seen by comparing
13 the language chosen - sales or leases - with Congress's efforts
14 to protect liens and security interests granted by the estate in
15 § 364. Section 364 permits the estate to grant liens and
16 security interests similar to those sought to be stripped here.
17 To protect lenders' reliance of on such grants, Congress added
18 § 364(e) to the Code. It states:

19 (e) The reversal or modification on appeal of an
20 authorization under this section to obtain credit or
21 incur debt, or of a grant under this section of a
22 priority or a lien, does not affect the validity of any
23 debt so incurred, or any priority or lien so granted,
24 to an entity that extended such credit in good faith,
25 whether or not such entity knew of the pendency of the
26 appeal, unless such authorization and the incurring of
27 such debt, or the granting of such priority or lien,
28 were stayed pending appeal.

26 ⁹ As we point out later, the type of lien-stripping that PW
27 and DB engaged in is specifically authorized in chapter 12 cases,
28 and the relevant statute there does not contain any provisions
similar to § 363(m). See 11 U.S.C. § 1206.

1 In § 364(e), Congress chose words specific to the task - "debt,"
2 "lien," and "priority." That these types of words are absent
3 from § 363(m) underscores congressional intent not to insulate
4 and immunize lien-stripping actions from appellate review.

5 Not surprisingly, DB argues that its agreement to purchase
6 the property was conditioned on receiving a free and clear title.
7 For that reason, the Confirmation Order contained language both
8 of sale and of lien-stripping. In DB's view, the sale language
9 cannot be separated from the lien-stripping language because both
10 sale and lien-stripping were integral to its decision to purchase
11 the property. See, e.g., Official Committee of Unsecured
12 Creditors v. Trism, Inc. (In re Trism, Inc.), 328 F.3d 1003, 1007
13 (8th Cir. 2003). In short, DB contends that authorization for
14 the sale also authorized the lien-stripping, and that one cannot
15 be affected without necessarily affecting the other.

16 In response, we observe that in choosing the words it did in
17 § 363(m), Congress did not intend the two types of actions to
18 receive the same level of protection. That is, divesting the
19 estate of property and vesting it in another is treated
20 differently from stripping a lien. Put another way, stripping a
21 lien is not a sale or a lease protected by the language of
22 § 363(m), either directly or indirectly.

23 A more nuanced response is that a sophisticated lender such
24 as DB knew of the risks inherent in relying solely on § 363(f) (5)
25 to strip Clear Channel's lien. It could not have avoided these
26 risks by, for example, insisting that the Confirmation Order
27 contain an explicit contractual condition that there be no
28 appellate review. That would have been rejected out of hand, as

1 any other express condition that similarly violated law or public
2 policy would have been. But a party ought not be able to do
3 indirectly what it cannot do directly, and we are reluctant to
4 interpret § 363(m) to give DB indirectly a review-free stripping
5 of Clear Channel's nonbankruptcy property rights. DB cannot mask
6 an improper condition of the transfer - avoiding appellate review
7 - by cloaking it as an essential and inseparable part of a sale.

8 The response to this argument is that all that the Code and
9 Rules provide for creditors such as Clear Channel is the ability
10 to seek a stay pending appeal. But in these circumstances, when
11 a bond staying the consummation of the deal would have been far
12 in excess of the lien that Clear Channel is trying to protect, we
13 question whether that remedy is exclusive.

14 In short, DB knew or should have known all along that lien-
15 stripping might not work. So its assertion that the sale was
16 inseparable from the lien-stripping rings hollow, as does its
17 argument that a stay was required to avoid mootness. See Suter,
18 504 F.3d at 990 (failure to obtain stay not always fatal to
19 mootness defense). We conclude that, on these facts, lien-
20 stripping under § 363(f) (5) is not protected under § 363(m).¹⁰

21 *B. Statutory Interpretation of § 363(f)*

22 Our holding that the appeal is not moot requires us to
23 consider whether § 363(f) permits the stripping of Clear
24

25 ¹⁰ Indeed, one commentator has decried the lack of doctrinal
26 consistency in the § 363(f) area and has indicated that
27 inconsistent and insufficiently justified applications of the
28 mootness doctrine have been one cause. George W. Kuney,
Misinterpreting Bankruptcy Code Section 363(f) and Undermining
the Chapter 11 Process, 76 AM. BANKR. L.J. 235, 244 & n.32 (2002).

1 Channel's lien. Sales free and clear of interests are authorized
2 under § 363(f). That subsection provides:

3 (f) The trustee may sell property under subsection
4 (b) or (c) of this section free and clear of any
5 interest in such property of an entity other than the
6 estate, only if—

7 (1) applicable nonbankruptcy law permits sale of
8 such property free and clear of such interest;

9 (2) such entity consents;

10 (3) such interest is a lien and the price at which
11 such property is to be sold is greater than the
12 aggregate value of all liens on such property;

13 (4) such interest is in bona fide dispute; or

14 (5) such entity could be compelled, in a legal or
15 equitable proceeding, to accept a money satisfaction of
16 such interest.

17 11 U.S.C. § 363(f).

18 Of the five paragraphs that authorize a sale free and clear,
19 three do not apply to this appeal. Paragraph (1) does not apply
20 because applicable law - California real property law - does not
21 permit a sale free and clear, and indeed would preserve Clear
22 Channel's lien despite the transfer. Nguyen v. Calhoun, 105 Cal.
23 App. 4th 432, 438, 129 Cal. Rptr. 2d 436, 445 (Cal. Ct. App.
24 2003) ("Real property is transferable even though the title is
25 subject to a mortgage or deed of trust, but the transfer will not
26 eliminate the existence of that encumbrance. Thus, the grantee
27 takes title to the property subject to all deeds of trust and
28 other encumbrances, whether or not the deed so provides.")
(citations omitted). Paragraph (2) is inapplicable as Clear
Channel did not consent to the transfer free of its interest.
Paragraph (4) applies only if the interest is in bona fide
dispute, and no one disputes the validity of Clear Channel's
lien. As a result, we need only analyze the bankruptcy court's
ability to authorize a sale free and clear of Clear Channel's

1 lien under paragraphs (3) and (5).

2 **1. Guidance on Interpretation**

3 We first review case law on statutory interpretation because
4 paragraphs (3) and (5) of § 363(f) present legitimate and
5 difficult questions of statutory interpretation. Paragraph (3),
6 for example, uses a nonstandard term to refer to the claims held
7 by creditors secured by the property being sold. It refers to
8 the "aggregate value of all liens" on the property. The Code,
9 however, tends to refer not to the economic value of the property
10 secured by liens but to the value of claims secured by those
11 liens. See, e.g., 11 U.S.C. §§ 506(a); 1129(b)(2). If
12 § 363(f)(3) had been worded to refer to the "aggregate value of
13 all claims secured by liens on such property," it would have been
14 in the mainstream of other provisions of the Code, and no real
15 question would be presented. But it was not. This variant
16 locution requires us to decide whether the unusual construction
17 should be given special interpretive significance.

18 Paragraph (5) presents an even greater conundrum: the
19 competing constructions seem either to render it so specialized
20 as never to be invoked, or all-powerful, subsuming all the other
21 paragraphs of § 363(f). Before launching into the task of
22 interpreting these two paragraphs, we should first review
23 applicable rules of construction for federal statutes. See
24 Thomas F. Waldron & Neil M. Berman, Principled Principles of
25 Statutory Interpretation: A Judicial Perspective after Two Years
26 of BAPCPA, 81 AM. BANKR. L.J. 195, 202-11 (2007).

27 When construing any federal statute, the presumption is that
28 the accepted and plain meaning of the words used reflects the

1 sense in which Congress used them. As the Supreme Court has
2 stated:

3 The starting point in discerning congressional
4 intent is the existing statutory text . . . and not the
5 predecessor statutes. It is well established that
6 "when the statute's language is plain, the sole
function of the courts – at least where the disposition
required by the text is not absurd – is to enforce it
according to its terms."

7 Lamie v. United States Trustee, 540 U.S. 526, 534 (2004), quoting
8 Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530
9 U.S. 1, 6 (2000) (in turn quoting United States v. Ron Pair
10 Enters., Inc., 489 U.S. 235, 241 (1989)).

11 But there is more. Because the words of a statute are meant
12 to be law, the legal background of the words used, as well as a
13 lawyer's understanding of them, are also important. Part of the
14 background relevant to this appeal is Congress's promulgation of
15 federal bankruptcy law as a separate title of the United States
16 Code. This separate title is organized as a cohesive code. For
17 example, it groups similar topics together through the use of
18 chapters, and it uses common, defined terms throughout. See 11
19 U.S.C. § 101. To aid in consistent application, the Code's terms
20 are sometimes defined in ways that vary from standard English. A
21 "custodian," for example, is not a janitor or building
22 superintendent, but rather a receiver or trustee for the debtor's
23 property. See 11 U.S.C. § 101(11).¹¹

24 Further, the Supreme Court has acknowledged that even
25

26 ¹¹ This type of variance is not restricted to the Bankruptcy
27 Code. In the Uniform Commercial Code, "afternoon" can mean one
28 minute before midnight. See UCC § 4-104(a)(2) ("afternoon" is
any time between noon and midnight).

1 undefined words and phrases in the Bankruptcy Code should
2 presumptively receive the same construction, even if found in
3 different parts of the code. See Rousey v. Jacoway, 544 U.S.
4 320, 326-27 (2005) (looking at use of "on account of" in
5 provisions of the Bankruptcy Code other than the one at issue).
6 See also Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809
7 (1989) ("[S]tatutory language cannot be construed in a vacuum.
8 It is a fundamental canon of statutory construction that the
9 words of a statute must be read in their context and with a view
10 to their place in the overall statutory scheme."); Am. Bankers
11 Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005) ("Our goal in
12 interpreting a statute is to understand the statute 'as a
13 symmetrical and coherent regulatory scheme' and to 'fit, if
14 possible, all parts into a . . . harmonious whole.'" (quoting
15 Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S.
16 120, 133 (2000)).¹²

17 That brings us to § 363(f), and its proper interpretation.
18

19 ¹² Even those who seek a strict reading of statutes embrace
20 this contextual approach. As a leading proponent of the
21 textualist school, Professor John Manning at Harvard Law School,
22 states: "textualists further acknowledge that '[i]n textual
23 interpretation, context is everything.'" John F. Manning, What
24 Divides Textualists From Purposivists?, 106 COLUM. L. REV. 70, 79-
25 80 (2006) (footnotes omitted) (quoting Antonin Scalia, Common-Law
26 Courts in a Civil Law System: The Role of United States Federal
27 Courts in Interpreting the Constitution and Laws, in A MATTER OF
28 INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997)). Put another way,
"modern textualists urge judges to focus on what they consider
the more realistic - and objective - measure of how 'a skilled,
objectively-reasonable user of words' would have understood the
statutory text in context." Manning, supra, 106 COLUM. L. REV. at
75 (quoting Frank H. Easterbrook, The Role of Original Intent in
Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)).

1 **2. Paragraph (3) and Sales for Less than the Amount**
2 **of All Claims Secured by the Property**

3 PW's property sold for less than the amount of claims
4 secured by PW's property. DB and the Trustee contend that
5 § 363(f) (3) authorizes the sale free and clear of the liens in
6 this situation.¹³ The bankruptcy court found, and we agree, that
7 § 363(f) (3) cannot be so used.

8 The actual text of paragraph (3) permits a sale free and
9 clear of an interest only if:

10 (3) such interest is a lien and the price at which
11 such property is to be sold is greater than the
 aggregate value of all liens on such property;

12 The Trustee asserts that the "aggregate value of all liens" in
13 this paragraph means the economic value of such liens, rather
14 than their face value. This argument arises from § 363(f) (3)'s
15 variance from general Code usage; that is, whether its reference
16 to "value of all liens" is simply an unfortunate deviation from
17 the Code's general preference to refer to claims, and not liens,
18 or whether it has some other significance.

19 The Trustee and DB assert that, under conventional
20 bankruptcy wisdom, supported by § 506(a), the amount of an
21 allowed secured claim can never exceed the value of the property
22

23
24 ¹³ Although DB has not appealed the decision excluding
25 § 363(f) (3) as a basis for selling PW's property free and clear
26 of Clear Channel's lien, it does assert that § 363(f) (3) supports
27 the bankruptcy court's decision. Under the rule that we may
28 affirm a decision on any basis found in the record, Cal. Self-
Insurers' Sec. Fund v. Lorber Indus. of Cal. (In re Lorber Indus.
of Cal.), 373 B.R. 663, 670 (9th Cir. BAP 2007), we consider DB's
arguments in this regard.

1 securing the claim.¹⁴ Since a secured claim is a form of "lien,"
2 see 11 U.S.C. § 101(37), some courts have found that an estate
3 representative may use § 363(f)(3) to sell free and clear of the
4 property rights of junior lienholders whose nonbankruptcy liens
5 are not supported by the collateral's value. That is, there may
6 be a sale free and clear of "out-of-the-money" liens. See, e.g.,
7 In re Beker Indus. Corp., 63 B.R. 474, 476-77 (Bankr. S.D.N.Y.
8 1986); In re Terrace Gardens Park P'ship, 96 B.R. 707 (Bankr.
9 W.D. Tex. 1989); In re Oneida Lake Dev., Inc., 114 B.R. 352
10 (Bankr. N.D.N.Y. 1990); In re WPRV-TV, Inc., 143 B.R. 315, 320
11 (D.P.R. 1991); Milford Group, Inc. v. Concrete Step Units, Inc.
12 (In re Milford Group, Inc.), 150 B.R. 904, 906 (Bankr. M.D. Pa.
13 1992); In re Collins, 180 B.R. 447, 450-01 (Bankr. E.D. Va.
14 1995).

15 We disagree. This reading expands § 363(f)(3) too far. It
16 would essentially mean that an estate representative could sell
17 estate property free and clear of any lien, regardless of whether
18 the lienholder held an allowed secured claim. We think the
19 context of paragraph (3) is inconsistent with this reading. If
20 Congress had intended such a broad construction, it would have
21 worded the paragraph very differently.¹⁵ See Ron Pair Enters.
22 489 U.S. at 242 n.5 (Congress knows distinction between types of
23

24 ¹⁴ This statement would not be true if a creditor could and
25 did make the § 1111(b) election to have its allowed secured claim
26 equal its total claim amount, 11 U.S.C. § 1111(b), or, in a
chapter 13 case, if the hanging paragraph of § 1325 applied, 11
U.S.C. § 1325(a).

27 ¹⁵ Or it would have worded it as it worded § 1206. See Part
28 III.B.3.b. infra.

1 liens, and language of the Bankruptcy Code should be interpreted
2 in a way that acknowledges that knowledge). For this reason,
3 many courts and commentators have rejected this approach. See,
4 e.g., Richardson v. Pitt County (In re Stroud Wholesale, Inc.),
5 47 B.R. 999, 1002 (E.D.N.C. 1985), aff'd mem., 983 F.2d 1057 (4th
6 Cir. 1986); Scherer v. Fed. Nat'l Mortgage Ass'n (In re Terrace
7 Chalet Apartments, Ltd.), 159 B.R. 821 (N.D. Ill. 1993); In re
8 Perroncello, 170 B.R. 189 (Bankr. D. Mass. 1994); In re Feinstein
9 Family P'ship, 247 B.R. 502 (Bankr. M.D. Fla 2000); In re
10 Canonigo, 276 B.R. 257 (Bankr. N.D. Cal. 2002); Criimi Mae Servs.
11 Ltd. P'ship v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R.
12 527 (D.N.J. 2003); see also In re Healthco Int'l, Inc., 174 B.R.
13 174 (Bankr. D. Mass. 1994); 3 COLLIER ON BANKRUPTCY ¶ 363.06[4][a]
14 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008).¹⁶

15 But another reason, rooted in the text of the paragraph,
16 exists to reject such an expansive reading. Paragraph (3)
17 permits the sale free and clear only when "the price at which
18 such property is to be sold *is greater than* the aggregate value
19 of all liens" 11 U.S.C. § 363(f)(3) (emphasis added).
20 If, as DB and the Trustee assert, "aggregate value of all liens"
21 means the aggregate amount of all allowed secured claims as used
22 in § 506(a), then the paragraph could *never* be used to authorize

24 ¹⁶ We also draw some interpretive comfort from Congress's
25 1984 amendment to § 363(f)(3). As noted in Stroud Wholesale, in
26 1984 Congress amended § 363(f)(3) to substitute "all liens on
27 such property" for "such interest," which made "clear Congress'
28 intention that sales free and clear of liens and interests may be
justified by (f)(3) only if the sale price will exceed the
aggregate value of all liens on the property." 47 B.R. at
1001-02.

1 a sale free and clear in circumstances like those present here;
2 that is, when the claims exceed the value of the collateral that
3 secures them. In any case in which the value of the property
4 being sold is less than the total amount of claims held by
5 secured creditors, the total of all allowed secured claims will
6 equal, not exceed, the sales price, and the statute requires the
7 price to be "greater than" the "value of all liens." See, e.g.,
8 In re Gen. Bearing Corp., 136 B.R. 361, 366 (Bankr. S.D.N.Y.
9 1992).

10 As a result, we join those courts cited above that hold that
11 § 363(f) (3) does not authorize the sale free and clear of a
12 lienholder's interest if the price of the estate property is
13 equal to or less than the aggregate amount of all claims held by
14 creditors who hold a lien or security interest in the property
15 being sold.

16 **3. Paragraph (5) and Sales for Less Than the**
17 **Lienholder's Claim**

18 The parties' main dispute lies over the proper application
19 of § 363(f) (5). The bankruptcy court, supported by the Trustee
20 and DB, found that the plain meaning of that paragraph permitted
21 a sale free and clear of Clear Channel's lien. On appeal, Clear
22 Channel argues that the paragraph's plain meaning does not
23 support the bankruptcy court's construction. Clear Channel has
24 the best of this argument. We thus reverse on this point.
25 Because the meaning of paragraph (5) is anything but plain, we
26 must carefully consider the statute's wording and the competing
27 interpretations.

1 We start with the text of the statute. Section 363(f) (5)
2 permits an estate representative, such as the Trustee, to sell
3 free of an entity's interest in estate property if:

4 (5) such entity could be compelled, in a legal or
5 equitable proceeding, to accept a money satisfaction of
such interest.

6 We parse this paragraph to contain at least three elements: that
7 (1) a proceeding exists or could be brought, in which (2) the
8 nondebtor could be compelled to accept a money satisfaction of
9 (3) its interest.

10 Courts are divided over the interpretation of each of these
11 elements. We analyze these components in reverse order. We
12 start first with an analysis of what Congress meant by an
13 "interest," then move to the proper construction of a money
14 satisfaction, and conclude with an examination of appropriate
15 legal and equitable proceedings.

16 **a. Lien as Interest**

17 Clear Channel's primary contention is that the term
18 "interest" must be read narrowly to exclude liens such as the one
19 it holds. So read, § 363(f) (5) would be inapplicable, as a
20 matter of law, to authorize the sale free and clear of Clear
21 Channel's lien. See, e.g., In re Canonigo, 276 B.R. at 266.
22 Clear Channel asserts that to do otherwise renders the other
23 subsections under § 363(f) mere surplusage.

24 We reject Clear Channel's argument. We believe that
25 Congress intended "interest" to have an expansive scope, as shown
26 by United States v. Knox-Schillinger (In re Trans World Airlines,
27 Inc.), 322 F.3d 283 (3d Cir. 2003). In TWA, the Third Circuit
28 held that there were two "interests" subject to § 363(f) (5):

1) travel vouchers issued in connection with settlement of a discrimination action and 2) discrimination claims made by the EEOC. The court reasoned that, if the debtor-airline had liquidated its assets under Chapter 7 of the Bankruptcy Code, the claims at issue would have been converted to dollar amounts, and the claimants would have received the distribution provided to other general unsecured creditors on account of their claims. Similarly, the EEOC discrimination claims were reducible to, and could have been satisfied by, monetary awards even if injunctive relief was sought. Id. at 290-91. See also P.K.R. Convalescent Ctrs., Inc. v. Virginia (In re P.K.R. Convalescent Ctrs., Inc.), 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (statutory right to recapture depreciation on sale of health facility an interest within meaning of § 363(f)(5)). See also Kuney, 76 AM. BANKR. L.J. at 257 (lien is a subset of interests).

Some cases, however, have adopted a restricted construction of "interest" in order to prevent needless overlap. In particular, cases such as In re Canonigo reason that the term "interest" must be read differently in (f)(5) from every other use of the term in § 363(f). In re Canonigo, 276 B.R. at 265.

But the distinctions drawn by Canonigo are not supported by the plain reading we are required to give to the statute. It is telling that the introductory sentence to § 363(f) broadly refers to "any interest," and that four of the following paragraphs then refer back to "such interest." Within this group is § 363(f)(3), which explicitly states that it applies only if "such interest is a lien," making it apparent that Congress intended a lien to be a type of interest. Congress would not have used the language it

1 did in paragraph (f) (3), or at least would have included
2 additional language in paragraph (5), if it had intended to
3 exclude liens from paragraph (f) (5).

4 In addition, though the Code does not define "interest,"¹⁷
5 it does define "lien." Clear Channel's reading contradicts that
6 definition in which lien "means charge against or *interest* in
7 property." 11 U.S.C. § 101(37) (emphasis added). The definition
8 of lien provides another inference consistent with the
9 interpretation that a lien is but one type of interest. Clear
10 Channel asserts that Canonigo's interpretation promotes the
11 statutory purpose of avoiding the use of § 363(f) as a means of
12 escaping the rigors of the chapter 11 plan confirmation process.
13 Daniel J. Carragher, Sales Free and Clear: Limits on § 363(f)
14 Sales, AM. BANKR. INST. L.J., at 16 (July/August 2007).¹⁸

15 Consistent with the plain reading of § 363(f) generally, and
16 § 363(f) (5) in particular, we construe "interest" to include the
17 type of lien at issue in this appeal.

18 **b. Compelling Money Satisfaction**

19 Clear Channel's alternative position is that if § 363(f) (5)
20 does apply to authorize a sale free and clear of liens, then the
21 bankruptcy court erred in holding that Clear Channel "could be
22 compelled . . . to accept a money satisfaction" of its interest.

24 ¹⁷ Congress did refer to equity positions in partnerships as
25 "interests," 11 U.S.C. § 101(16) (B), and did define a "security
interest" as a lien created by agreement. Id. § 101(51).

26 ¹⁸ Some courts have reconciled the differences by simply
27 stating that "[l]iens are addressed directly in § 363(f) (3) and
28 it is that section which is to be applied." Beker, 63 B.R. at
478.

1 i. Compelling Satisfaction for Less Than
2 Full Payment

3 The bankruptcy court found paragraph(f) (5) applicable
4 whenever a claim or interest can be paid with money.¹⁹ We do not
5 think that § 363(f) (5) is so simply analyzed. Although it is
6 tautological that liens securing payment obligations can be
7 satisfied by paying the money owed,²⁰ it does not necessarily
8 follow that such liens can be satisfied by paying any sum,
9 however large or small. We assume that paragraph (5) refers to a
10 legal and equitable proceeding in which the nondebtor could be
11 compelled to take less than the value of the claim secured by the
12 interest. See In re Gulf States Steel, Inc. of Ala., 285 B.R.
13 497, 508 (Bankr. N.D. Ala. 2002).

14 Other courts agree and hold that it is not the type of
15 interest that matters, but whether monetary satisfaction may be
16 compelled for less than full payment of the debt related to, or
17 secured by, that interest. In re Terrace Chalet Apts., 159 B.R.
18 at 829 ("By its express terms, Section 363(f) (5) permits lien
19 extinguishment if the trustee can demonstrate the existence of
20 another legal mechanism by which a lien could be extinguished
21 without full satisfaction of the secured debt."); In re Stroud
22 Wholesale, Inc., 47 B.R. at 1002; WBQ P'ship v. Virginia Dep't of
23 Med. Assistance Servs. (In re WBQ P'ship), 189 B.R. 97, 107

24
25 ¹⁹ The bankruptcy court stated at the hearing, "The question
26 is, is it the kind of an interest that could be satisfied with
27 money, and if so, then, you can sell free and clear." Hr'g. Tr.
28 99:1-3 (April 5, 2007).

²⁰ If the lien secured the faithful performance of a
nonmonetary obligation, the generalization would not apply.

1 (Bankr. E.D. Va. 1995). If full payment were required,
2 § 363(f) (5) would merely mirror § 363(f) (3) and render it
3 superfluous. In re Terrace Chalet Apts., 159 B.R. at 829.

4 Under the view that full payment is not necessary, it is not
5 the amount of the payment that is at issue, but whether a
6 "mechanism exists to address extinguishing the lien or interest
7 without paying such interest in full." In re Gulf States Steel,
8 285 B.R. at 508. Other courts have required a showing of the
9 basis that could be used to compel acceptance of less than full
10 monetary satisfaction. See, e.g., id.; In re Terrace Chalet
11 Apts., 159 B.R. at 829.

12 Although this view leads to a relatively small role for
13 paragraph (5), we are not effectively writing it out of the Code.
14 Paragraph (5) remains one of five different justifications for
15 selling free and clear of interests, and its scope need not be
16 expansive or all-encompassing. So long as its breadth
17 complements the other four paragraphs consistent with
18 congressional intent, without overlap, our narrow view is
19 justified.

20 Examples can be formulated that demonstrate this
21 complementary aspect of a narrow view of paragraph (5).²¹ One
22

23 ²¹ Collier seems to indicate that UCC § 9-320, which permits
24 a sale free and clear of a consensual security interest if the
25 collateral is sold in the ordinary course of business of the
26 debtor, might satisfy paragraph (5). 3 COLLIER ON BANKRUPTCY ,
27 supra, ¶ 363.06[6][a]. We think, however, that such a use is
28 better classified under paragraph (1). Somewhat paradoxically,
Collier also indicates that UCC § 9-320 satisfies the
requirements of paragraph (1). 3 COLLIER ON BANKRUPTCY, supra,
¶ 363.06[2].

1 might be a buy-out arrangement among partners, in which the
2 controlling partnership agreement provides for a valuation
3 procedure that yields something less than market value of the
4 interest being bought out. See, e.g., De Anza Enters. v.
5 Johnson, 104 Cal. App. 4th 1307, 128 Cal. Rptr. 2d 749 (Cal. Ct.
6 App. 2002) (joint venturer may compel specific performance of
7 buyout of other venturer's interest pursuant to joint venture
8 agreement); Oliker v. Gershunoff, 195 Cal. App. 3d 1288, 241 Cal.
9 Rptr. 415 (Cal. App. 2d Dist. 1987) (statute provided that
10 partnership could compel buyout of withdrawing partner for a fair
11 price to be determined by several factors). Another might be a
12 case in which specific performance might normally be granted, but
13 the presence of a liquidated-damages clause allows a court to
14 satisfy the claim of a nonbreaching party in cash instead of a
15 forced transfer of property. See, e.g., O'Shield v. Lakeside
16 Bank, 335 Ill. App. 3d 834, 781 N.E.2d 1114 (Ill. App. Ct. 2002).
17 Yet another might be satisfaction of obligations related to a
18 conveyance of real estate that normally would be specifically
19 performed but for which the parties have agreed to a damage
20 remedy. S. Motor Co. v. Carter-Pritchett-Hodges, Inc. (In re MMH
21 Automotive Group, LLC), ___ B.R. ___, 2008 WL 725102 (Bankr. S.D.
22 Fla., Mar. 17, 2008). In these cases, a court could arguably
23 compel the holders of the interest to take less than what their
24 interest is worth.²²

25
26 ²² A related example might be the ability to sell free and
27 clear of a vendor's right to refuse to deliver except upon full
28 cash payment, but the adequate protection required by § 363(e)
for such a sale would likely be the full cash payment itself.

(continued...)

1 ii. Construction Consistent with
2 §§ 363(f)(3) and 1206

3 While the bankruptcy court's reading is plausible if
4 paragraph (5) is read in isolation, statutory interpretation
5 requires a more detailed examination of the context of the
6 statute. See, e.g., Davis v. Michigan Dep't of Treasury, 489
7 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed
8 in a vacuum. It is a fundamental canon of statutory construction
9 that the words of a statute must be read in their context and
10 with a view to their place in the overall statutory scheme.").
11 Put another way, any interpretation of paragraph (5) must satisfy
12 the requirement that the various paragraphs of subsection (f)
13 work harmoniously and with little overlap. The bankruptcy
14 court's broad interpretation does not do this.

15 Initially, if the Trustee's and DB's interpretation were
16 accepted, paragraph (5) would swallow and render superfluous

17 _____
18 ²²(...continued)

18 See, e.g., In re Kellstrom Indus., Inc., 282 B.R. 787, 794
19 (Bankr. D. Del. 2002).

20 Of course, if the interest is such that it may be vindicated
21 only by compelling or restraining some action, it does not
22 qualify under this aspect of § 363(f)(5), and the estate cannot
23 sell free and clear of that interest. See, e.g., Gouveia v.
24 Tazbir, 37 F.3d 295 (7th Cir. 1994) (landowners whose land
25 bordered on estate's land could not be compelled to accept money
26 damages in lieu of equitable relief for violation of a reciprocal
27 land covenant restricting the neighborhood to single-story,
28 residential property; estate could therefore not sell the
property free of the covenant under § 363(f)(5)). See also In re
WBQ P'ship, 189 at 106 (finding § 363(f)(5) inapplicable to
restrictive covenants without reference to specific state law
governing monetary versus equitable satisfaction) (dicta); In re
523 E. Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568, 576
(Bankr. S.D.N.Y. 1987) (court may not sell free and clear of
covenant to provide low-income housing).

1 paragraph (3), a provision directed specifically at liens. The
2 specific provisions of paragraph (3) would never need to be used,
3 since all liens would be covered, regardless of any negative or
4 positive relationship between the value of a creditor's
5 collateral and the amount of its claim. A result that makes one
6 of five paragraphs redundant should be avoided.

7 A more narrow reading is also suggested by Congress's
8 addition of § 1206 to the Code in 1986. Pre-BAPCPA section 1206
9 provided that:

10 [a]fter notice and a hearing, *in addition to the*
11 *authorization contained in section 363(f)*, the trustee
12 in a case under this chapter may sell property under
13 section 363(b) and (c) free and clear of any interest
14 in such property of an entity other than the estate if
the property is farmland or farm equipment, except that
the proceeds of such sale shall be subject to such
interest.

15 11 U.S.C.A § 1206 (West 2004) (emphasis added). Congress thus
16 intended § 1206 to supplement an estate's rights. 8 COLLIER ON
17 BANKRUPTCY, *supra*, at ¶ 1206.01[2] ("The rights granted to the
18 trustee under § 1206 supplement rather than replace a similar
19 right provided by § 363(f)."). As a result, both § 363(f)(5) and
20 § 1206 apply to sales of estate property in chapter 12.²³

21 The interpretive challenge is to construe § 363(f)(5) in a
22 way that complements § 1206. In this regard, the first
23 difference between the two provisions is that, unlike § 363(f),
24 § 1206 grants an absolute right to sell free and clear of an
25

26 ²³ Chapter 12 also permits confirmation over the dissent of
27 a secured creditor, 11 U.S.C. § 1225(a)(5), and thus § 1206's
28 existence belies the effort to select cramdown as a type of legal
or equitable proceeding to which § 363(b)(5) refers.

1 interest so long as the interest attaches to the proceeds. This
2 absolute right does not exist in § 363(f)(5), requiring a more
3 narrow interpretation.²⁴

4 Congress added § 1206 in 1986. Its purpose was "to allow
5 family farmers to sell assets not needed for the reorganization
6 prior to confirmation without the consent of the secured creditor
7 subject to the approval of the court." H.R. REP. No. 958, 99TH
8 CONG., 2D SESS. 50 (1986). Significantly, Congress explicitly
9 made it clear that an interest includes a lien. Id. But § 1206
10 would be unnecessary with respect to liens if § 363(f)(5) already
11 permitted a sale. See In re Brileya, 108 B.R. 444, 447 (Bankr.
12 D. Vt. 1989) ("Section 1206 modifies § 363(f) so the debtor can
13 sell assets not necessary to the reorganization without the
14 secured creditor's consent.").

15 We follow this reasoning and hold that the bankruptcy court
16 must make a finding of the existence of such a mechanism and the
17 trustee must demonstrate how satisfaction of the lien "could be
18 compelled." In re Terrace Chalet Apts., 159 B.R. at 829-30.
19 Here the bankruptcy court should not have explicitly dismissed
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22 ²⁴ A sale under § 363(f) is subject to § 363(e), which also
23 conditions the sale on the provision of adequate protection.
24 "Most often, adequate protection in connection with a sale free
25 and clear of other interests will be to have those interests
26 attached to the proceeds of the sale." H.R. REP. No. 595, 95th
27 Cong., 1st Sess. 345 (1977); S. REP. No. 989, 95th Cong., 2d Sess.
28 56 (1978). With respect to a lien, then, § 1206 provides no more
than § 363(f)(5) if the availability of nonconsensual
confirmation under § 1225(a)(5) is sufficient as a legal and
equitable proceeding to trigger a sale free and clear under
§ 363(f)(5).

1 the argument that any such finding or showing is required.²⁵

2 **c. Legal or Equitable Proceeding**

3 Paragraph (5) requires that there be, or that there be the
4 possibility of, some proceeding, either at law or at equity, in
5 which the nondebtor could be forced to accept money in
6 satisfaction of its interest.²⁶ The bankruptcy court reasoned
7 that there was no need to prove the existence or possibility of a
8 qualifying legal or equitable proceeding when the interest at
9 issue was a lien because all liens, by definition, are capable of
10 being satisfied by money.²⁷

11 The language of § 363(f)(5) indicates that compelling a
12 nondebtor to accept a monetary satisfaction cannot be the sole
13 focus of the inquiry under that paragraph. The statute
14 additionally requires that "such entity could be compelled, *in a*
15 *legal or equitable proceeding*, to accept" such a monetary
16 satisfaction. 11 U.S.C. § 363(f)(5) (emphasis added). The
17 question is thus whether there is an available type or form of

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19 ²⁵ The Trustee and DB attempt to resolve this dilemma by
20 asserting that if (f)(5) is found to require full payment of the
21 debt, then (f)(3) must require full payment of the economic value
22 of the lien - the value of the property - rather than full
payment of the debt itself. This interpretation, however, makes
(f)(5) superfluous.

23 ²⁶ We assume, but do not decide, that the apposite "in a
24 legal or equitable proceeding" excludes the possibility of an
administrative proceeding.

25 ²⁷ The bankruptcy court stated at the hearing, "I don't even
26 think they need to prove their cram-down scenario. I think . . .
27 that they could be made to go away if you wrote them a check. . .
28 . The question is, is it the kind of an interest that could be
satisfied with money, and if so, then, you can sell free and
clear." Hr'g. Tr. 98:20 - 99:3 (April 5, 2007).

1 legal or equitable proceeding in which a court could compel Clear
2 Channel to release its lien for payment of an amount that was
3 less than full value of Clear Channel's claim. Neither the
4 Trustee nor DB has directed us to any such proceeding under
5 nonbankruptcy law, and the bankruptcy court made no such finding.

6 The Trustee points out that courts have found that cramdown
7 under § 1129(b)(2) is a qualifying legal or equitable
8 proceeding.²⁸ See, e.g., In re Gulf States Steel, 285 B.R. at
9 508; In re Grand Slam USA, Inc., 178 B.R. 460, 462 (E.D. Mich.
10 1995); In re Healthco, 174 B.R. at 176; In re Terrace Chalet
11 Apts., 159 B.R. at 829.

12 We disagree with the reasoning of these courts. As a
13 leading treatise recognizes, use of the cramdown mechanism to
14 allow a sale free and clear under § 363(f)(5) uses circular
15 reasoning - it sanctions the effect of cramdown without requiring
16 any of § 1129(b)'s substantive and procedural protections. 3
17 COLLIER ON BANKRUPTCY, supra, at ¶ 363.06[6]. If the proceeding
18 authorizing the satisfaction was found elsewhere in the
19 Bankruptcy Code, then an estate would not need § 363(f)(5) at
20 all; it could simply use the other Code provision.

21 In addition, this reasoning undercuts the required showing
22 of a separate proceeding. For example, it is correct that
23 § 1129(b)(2) permits a cramdown of a lien to the value of the
24 collateral, but it does so only in the context of plan

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26 ²⁸ Courts use "cramdown" and "cram down" and "cram-down"
27 interchangeably to refer to nonconsensual confirmation. The
28 hyphenated version appears to have been the first locution used
by a court. New England Coal & Coke Co. v. Rutland R.R. Co., 143
F.2d 179, 189 n.36 (2d Cir. 1944).

1 confirmation. To isolate and separate the cramdown from the
2 checks and balances inherent in the plan process undermines the
3 entire confirmation process, and courts have been leery of using
4 § 363(b) to gut plan confirmation or render it superfluous.

5 We thus hold that Congress did not intend under § 363(f)(5)
6 that nonconsensual confirmation be a type of legal or equitable
7 proceeding to which that paragraph refers. As a result, the
8 availability of cramdown under § 1129(b)(2) is not a legal or
9 equitable proceeding to which § 363(f)(5) is applicable.

10 In short, for the reasons outlined above, § 363(f)(5) does
11 not apply to the circumstances of this case.

12 *C. Were Payments Made Pursuant to the "Carve-Out" Free and*
13 *Clear of Clear Channel's Lien?*

14 Clear Channel asserts that the removal of its lien from the
15 Carve-Out Amount was an abuse of discretion both procedurally and
16 substantively. We think this misperceives the nature of the
17 Carve-Out Amount, and we thus affirm on this point.

18 Implicit in Clear Channel's argument is that the Carve-Out
19 Amount was "sold" and that it constitutes proceeds of the sale of
20 PW's property. The structure of the transaction, however, does
21 not fit Clear Channel's characterization. The governing
22 documents do not provide that the Carve-Out Amount was part of
23 the Strike Price paid by DB, which DB was then obligated to
24 rebate to the Trustee.²⁹ Rather, DB's obligation to pay the

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26 ²⁹ Inasmuch as we construe the Carve-Out Amount as an
27 independent obligation of DB, and not as a transfer of its
28 property rights in its collateral, this is not a case in which a
secured creditor has allowed its collateral to be used by the

(continued...)

1 Carve-Out Amount "to [PW's] estate upon the Sale" was a separate
2 obligation.

3 The statement of the obligation was physically and logically
4 isolated from DB's obligation to pay the Strike Price. Its
5 source is in a separate part of the Binding Term Sheet, and the
6 ultimate calculation of the amount payable incorporated factors
7 separate from the sale. Thus, while the Sale Order expressly
8 attached Clear Channel's lien to the proceeds of the sale, the
9 Carve-Out Amount was not proceeds. As a result, no procedural or
10 substantive rights of Clear Channel were violated, as Clear
11 Channel cannot claim an interest in DB's nonpurchase obligations
12 to the Trustee.

13 IV. CONCLUSION

14 1. Considerations of equitable mootness and § 363(m) render
15 moot Clear Channel's appeal of the validity of the sale of PW's
16 property to DB. But Clear Channel's appeal of the lien-stripping
17 is not equitably moot because we can fashion effective relief,
18 and it is not statutorily moot because § 363(m) is inapplicable.

19 2. The bankruptcy court did not apply the correct legal
20 standard under § 363(f) (5), and it therefore did not make the
21 findings required by that paragraph. We therefore reverse that
22 part of the bankruptcy court's order that held that, under
23 § 363(f) (5), the sale was free and clear of Clear Channel's lien.

24 3. Further, because of the bankruptcy court's incorrect
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26 ²⁹ (...continued)
27 estate pursuant to agreement, and thus none of the implications
28 of such a practice on the absolute priority rule are raised on
this record. See, e.g., In re Armstrong World Indus., Inc., 432
F.3d 507, 513-14 (3d Cir. 2005).

1 interpretation of the statute, we remand this case for further
2 proceedings consistent with this disposition. This will allow
3 the parties to attempt to identify a qualifying proceeding under
4 nonbankruptcy law (if one exists) that would enable them to strip
5 Clear Channel's lien and make the sale of PW's property to DB
6 free and clear under § 363(f)(5).

7 4. We affirm the bankruptcy court's holding that Clear
8 Channel's lien did not attach to the Carve-Out payment that DB
9 made to the Trustee.

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